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For The Northern Mariana Islands
By _____
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UNITED STATES DISTRICT COURT

NORTHERN MARIANA ISLANDS

11	UNITED STATES OF AMERICA,)	Criminal Case No. ⁰³⁻⁰⁰⁰⁰¹ 04-00009 
12)	
12	Plaintiff,)	Trial: Jury
13)	Date: August 8, 2005
13	v.)	Time: 9:00 a.m.
14	VANN LE,)	Judge: Hon. A. Wallace Tashima
15)	GOVERNMENT'S MOTION IN LIMINE
15)	TO ADMIT DEFENDANT'S
16	Defendant.)	STATEMENTS TO SEPARATED SPOUSE
17)	
17	_____)	

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Leonardo M. Rapadas, United States Attorney, and Timothy E. Moran, Assistant United States Attorney, and hereby moves in limine to admit statements made by the defendant to his separated spouse. Because the statements were made after the defendant and his spouse had all but formally ended their marriage, such statements are not covered by the marital communications privilege.

In this case, the Government alleges that the defendant conspired with two accomplices to rob the Citytrust bank in Saipan, CNMI. The defendant did not enter the bank himself but planned and assisted in the robbery. Following the robbery, the defendant traveled to Japan, where he saw his

1 separated wife, Yuki Higuchi. The defendant admitted his involvement in the conspiracy and
2 responsibility for the robbery to Ms. Higuchi. Prior to this confession, and the Citytrust bank robbery,
3 the defendant and Ms. Higuchi had permanently separated. The Government intends to call Ms. Higuchi
4 and offer those statements.

5 The Government intends to introduce evidence that Ms. Higuchi met the defendant in February
6 2000 as a student visiting from Japan, moved to Saipan in August, 2000, and married the defendant in
7 November, 2000. Ms. Higuchi became involved in the defendant's business, a marine sports rental
8 business, and borrowed \$20,000 from her father to invest in the business. However, their marriage
9 quickly broke down due to the defendant's extra-marital affairs. The defendant and Ms. Higuchi
10 separated in October, 2001, following an argument between the defendant and Ms. Higuchi during
11 which he discarded his wedding ring. Ms. Higuchi then returned to Japan. Before the robbery occurred,
12 Ms. Higuchi visited Saipan once, in January 2002, to see her dog, stayed at a hotel and spoke to the
13 defendant only about their business. The defendant's appearance in Japan on April 19, 2002, surprised
14 Ms. Higuchi, as he had not told her that he was coming and did not expect him. They met at the
15 Nishikoyama train station in Tokyo and argued briefly before he left to meet another girlfriend. Ms.
16 Higuchi did not invite the defendant, nor did he request, to stay with her. Later, after the defendant fled
17 the jurisdiction, Ms. Higuchi returned to Saipan to attend to the business. Ms. Higuchi considers herself
18 permanently separated from the defendant; she has not formally divorced the defendant because of her
19 CNMI immigration status as an immediate relative.

20 Because the defendant and Ms. Higuchi were permanently separated when the defendant made
21 his statements to her, the marital communications privilege does not apply.¹ United States v. Roberson,
22 859 F.2d 1376, 1381 (9th Cir. 1988); United States v. Marashi, 913 F.2d 724, 730 (9th Cir. 1990). The

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24 ¹ A different privilege, the spousal testimonial privilege, permits a witness to refuse to testify
25 against his or her spouse. Trammel v. United States, 445 U.S. 40, 53 (1980). The witness spouse alone
may exercise that privilege. Id.; United States v. Montgomery, 384 F.3d 1050, 1056 (9th Cir. 2004). In
this case, Ms. Higuchi is willing to testify against the defendant, so that privilege does not apply.

1 marital communications privilege applies only to (1) communications; (2) made during a valid marriage;
 2 and (3) which are confidential. Marashi, 913 F.2d at 729-30. A permanent separation, even if the
 3 marriage still exists legally, contradicts the second criterion.

4 The marital communications privilege must be narrowly construed “because it obstructs the truth
 5 seeking process. Use of the privilege in criminal proceedings requires a particularly narrow construction
 6 because of society’s strong interest in the administration of justice.” Marashi, 913 F.2d at 730; see also
 7 United States v. Nixon, 418 U.S. 683, 710 (1974). The privilege is intended to insure that spouses may
 8 “communicate their deepest feelings to each other without fear of eventual exposure in a court of law.”
 9 Roberson, 859 F.2d at 1380, citing United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1985). This
 10 interest is balanced against society’s interest in truth and the administration of justice. Id. Society’s
 11 interest in truth and justice outweighs society’s interest in protecting the confidentiality of a *failed*
 12 marriage – including a marriage whose spouses have permanently separated but not yet divorced. Id.²

13 The Ninth Circuit considered this issue in Roberson, which upheld the Government’s
 14 introduction of a confession that the defendant made to his wife after he had instituted divorce
 15 proceedings, moved out of the home, and been the subject of a temporary restraining order. 859 F.2d at
 16 1377. Notwithstanding the defendant’s still legally valid marriage at the time of the statement, the
 17 privilege did not apply because the couple were separated with no hope of reconciliation. Id. at 1381.
 18 This position is consistent with Ninth Circuit precedent and other circuits. See United States v. Lustig,
 19 555 F.2d 737, 748 (9th Cir. 1977) (privilege inapplicable where defendant’s common law “relationship
 20 had been terminated with no chance of reconciliation”); Byrd, 750 F.2d at 588 (privilege inapplicable
 21 where defendant and his wife had been separated for a year and lived in different homes); In re Witness

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 23 ² The Ninth Circuit recognizes other limitations on the marital communications privilege where
 24 society’s interest in truth outweighs one spouse’s desire to keep marital communications confidential.
 25 See Marashi, 913 F.2d at 730 (privilege does not apply to communications pertaining to future crimes in
 which both spouses participate); United States v. White, 974 F.2d 1135, 1138 (9th Cir. 1992) (the
 “marital communications privilege should not apply to statements relating to a crime where a spouse or a
 spouse’s children are the victims”).

1 Before Grand Jury, 791 F.2d 234, 238 (2d Cir. 1986) (denying privilege to witness who refused to
2 answer questions about her husband before grand jury where witness had not lived with husband for 11
3 years and husband had fathered a child by another woman).

4 Where application of the marital communications privilege is contested, Roberson directs the
5 District Court to find first that the husband and wife were separated at the time of the communication.
6 Then the Court should “undertake a more detailed investigation into in the irreconcilability of the
7 marriage. It should consider all other relevant circumstances,” including the length of separation and
8 stability of the marriage. Roberson, 859 F.2d at 1381. The Government bears the burden of proving
9 inapplicability. See Marashi, 913 F.2d at 730. Here, the Government will introduce evidence that
10 defendant and Ms. Higuchi were separated at the time of the statement. In addition, the evidence will
11 show that this separation was permanent: the marriage was not strong from the outset; the defendant
12 continued to pursue other relationships, with his wife’s knowledge, before and after the separation; the
13 spouses soon chose to live in different countries; when they were occasionally in the same place, neither
14 wished to reside with the other; and Ms. Higuchi refused to return to Saipan until the defendant had left.
15 Ms. Higuchi has not sought to divorce the defendant only because of her immigration status. However,
16 as the district court found in Roberson, a legal formality should not prevent a finding that the marriage is
17 effectively “defunct.” 859 F.2d at 1378.

18 Furthermore, the circumstances under which these statements were made demonstrate that they
19 are inconsistent with a spouse seeking to confide in a wife to whom he is still married. The defendant
20 made no attempt at secrecy and confessed to Ms. Higuchi at the Nishikoyama train station, where he
21 could have been overheard by any number of bystanders. The presence of third parties renders the
22 privilege inapplicable. See Pereira v. United States, 347 U.S. 1, 6 (1954) (statements in the presence of
23 third parties not confidential or protected by privilege); United States v. Lefkowitz, 618 F.2d 1313, 1318
24 (9th Cir. 1980) (statements not confidential when third parties might overhear); Marashi, 913 F.2d at 730
25 (privilege “does not extend to statements made before, or likely to be overheard by, third parties”). In

1 addition, he went straight from this argument to meet with another girlfriend and did not stay with Ms.
2 Higuchi. Under these circumstances, the Court should find that the separation was permanent and the
3 privilege accordingly inapplicable.

4 For the reasons stated above, the Government requests that the Court (1) permit the Government
5 to make an offer of proof regarding the defendant's separation from Ms. Higuchi; and (2) admit the
6 defendant's statements to Ms. Higuchi into evidence.

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8 LEONARDO M. RAPADAS
9 United States Attorney
Districts of Guam and the NMI

10 Date: 7/25/05

11 By:


12 TIMOTHY E. MORAN
13 Assistant United States Attorney
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